IN THE

Supreme Court of the United States

October, 1972

No. 72-1061

WINDWARD SHIPPING (LONDON) LIMITED, et al.,
Petitioners,

v.

AMERICAN RADIO ASSOCIATION AFL-CIO, et al.,
Respondents

BRIEF FOR RESPONDENTS

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Opinions Below

The order of the Supreme Court of Texas dated October 4, 1972, denying petitioners' application for a writ of error determined, "that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals," and not otherwise reported. (A. 139)*

The opinion of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, dated May 17, 1972 (A. 125-138), is reported at 482 S.W. 2d 675.

The opinion and order of the District Court of Harris County, 164th Judicial District of Texas, dated December 10, 1971, has not been reported (A. 125).

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* "A" references are to pages of the Joint Appendix.

Jurisdiction

The alleged jurisdictional requisites are set forth at page 2 of petitioners' brief.

Question Presented

Whether the Labor Management Relations Act as amended, 61 Stat. 136, 29 U.S.C. Sec. 141 et seq., preempts state jurisdiction to enjoin peaceful, non obstructive and truthful picketing of select foreign flag vessels in United States ports, protesting that the wages and benefits paid and provided seamen aboard such vessels are substandard to those of American seamen resulting in extreme damage to American seamen wage standards and benefits, loss of jobs and employment opportunities here in the United States, and seeking to preserve such employment opportunities, further requesting persons not to partonize such vessels as a consequence of which, American employees of American employers refused to patronize or work upon the picketed vessels.

Statutes Involved

The relevant statutory provisions are: Labor Management Relations Act, Secs. 7 and 8(b)(4); 29 USC Secs. 157 and 158(b)(4). Such sections provisions are printed in the Appendix to this Brief.

Statement of the Case

The background facts:

The respondents are six labor organizations who collectively represent the overwhelming majority and practically almost all American merchant seamen. In late October 1971, respondents' representatives convened a meeting to

discuss the causes of the serious loss of an overwhelming number of employment opportunities (berths) for their members here in the United States aboard American Flag vessels, and to take such lawful action to arrest the decline of such opportunities and preserve those that remained (A. 68-75, Resp. Exh. 8).

It was determined, that the fundamental cause for such loss of berth opportunities aboard American Flag ships here in the United States, was the tremendous decline of carriage of American sea borne commerce in American vessels with the gain to foreign flag vessels of the transportation of such American sea borne commerce. As demonstated by a study made by the United States Department of Commerce, reflected in its Maritime Administration Annual Report for the fiscal year 1970,[1] Chart VI (A. 50, Resp. Exh. D-7), in the period of 1951 to 1969, the carriage of American sea borne commerce in American Flag ships employing American seamen, had declined from the carriage in 1951 of 39.8% of such commerce, to 4.8% in 1969. Equally shocking, was that during the same period, American sea borne commerce had increased from 193.1 million tons in 1951 to 427.9 million tons in 1969. In summary, notwithstanding an increase in tonnage of American sea borne commerce during that period of almost 125%, such commerce's carriage in American Flag vessels manned by American seamen, declined 85% (A. 53-57). During the period aforesaid, the number of American Flag vessels of 1,000 gross tons or more, had declined from 1262 ships to approximately 630 ships (A. 55).

As a consequence of all of the foregoing, berth employment opportunities for American seamen here in the United States aboard American Flag vessels, were reduced from slightly better than 93,000 in 1951, to approximately 30,000 in 1971 (A. 55, 56). Most of such decrease occurred during the last 4 to 5 years of the above period (A. 96, 97, 107,

[1] U. S. Government Printing Office Stock No. 0307-0021, 1971

108, 110, 122). And such loss of employment opportunities occurred notwithstanding substantial measures taken by the respondents, to reduce manning and bring about other labor saving devices and costs (A. 97, 99, 121).

It was most apparent to respondents and observers, that a fundamental and prime cause for the foregoing loss of employment opportunities here in the United States aboard American Flag vessels, where the lower wages and benefits paid and provided foreign seamen on foreign flag vessels which were drastically substandard to those paid and provided American seamen aboard American Flag vessels resulting in such foreign vessels insatiable appetite to consume more and more the carriage of American sea borne commerce. In 1971, the time in issue at bar, the base pay for a typical American Able Bodied seaman aboard an American Flag vessel, was $528.46 per month (A. 108, NMU Collective Bargaining Agreement, Resp. Exh. 1), with annual earnings for 8 to 9 month service aboard an American Flag vessel, of approximately $8,000 before taxes (A. 124).[2] In sharp contrast, foreign Able Bodied seamen's wages aboard the foreign vessel, transporting American sea borne commerce, was $68.10 per month (A. 89, Pet. Exh. 12, Articles of Agreement). Such disparity conferred an enormous advantage to foreign flag vessels transporting American sea borne commerce, with most dire adverse consequences to the wage standards, employment conditions and job opportunities for respondents' members in the United States. Respondents then formed into a Committee, to take lawful steps to protect and preserve their members' American employment opportunities and standards here in the United States (A. 71-75, Resp. Exh. 8, A. 72, 73).

Respondents determined to engage in peaceful and nonobstructive picketing of selected vessels at public docks

[2] Because of the nature of employment, being away from one's family, the average annual maritime employment is 8 to 9 months. (A. 124).

and at upon private premises with the owners' consent (A. 72, 73, 75, Resp. Exh. 8), and at upon the public streets and before home offices of certain shippers and shipping companies. In addition they determined to prepare and distribute leaflets at such locations and undertake the publicity of the issues via all media (A. 85, Resp. Exh. 9, A. 87, 91).

Respondents' Committee caused the preparation of appropriate picket signs to be carried by pickets and which read as follows:

"ATTENTION TO THE PUBLIC

The wages and benefits paid seamen aboard the vessel [3] are substandard to those of American seamen. This results in extreme damage to our wage standards and loss of our jobs. Please do not patronize this vessel. Help the American seamen. We have no dispute with any other vessel on this site." (Resp. Exh. 8, A. 73)

The picket signs bore the names of the six respondent picketing unions (Resp. Exh. 8, attachment 1, A. 72, 73, 75).

Leaflets for distribution by the pickets were prepared and read as follows:

"TO THE PUBLIC

American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.

American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.

A strong American Merchant Marine is essential to our national defense. The fewer American flag

[3] The name of the vessel selected to be picketed was inserted upon the picket sign.

ships there are, the weaker our position will be in a period of national emergency.

Please patronize American Flag Vessels, save our jobs, help our economy and support our National Defense by helping to create a strong American Merchant Marine.

Our dispute here is limited to the vessel picketed at this site, the SS [4]." (Resp. Exh. 8, attachment 2, A. 72, 73, 75).

Finally, prepared and distributed were written instructions to all persons engaging in the picketing and implementing the Committee's decision, which read as follows:

"[Instructions]

Your Union, along with other American Maritime Unions, has formed a Committee, to protest the loss of jobs to Foreign Flag operators transporting American Commerce and who operate such vessels at wages and benefits substandard to those enjoyed by American Seamen.

In support of this protest, these Unions are setting up publicity picketing around such Foreign Flag Vessels in American Ports.

Our organization will participate in carrying out this publicity picketing. In connection with this activity, if the publicity picketing is to take place in your Port, the following instructions must be followed to the letter.

1. If the vessel is at a Terminal and access cannot be had alongside the vessel, request must be made to the Terminal operator for the opportunity to picket alongside the vessel. If this request is denied, picketing is to take place at the entrance to the Terminal. Make a memorandum of your conversation with the Terminal operator.

2. There should be no more than 4 pickets at any one site, at any one time. Pickets must be in-

[4] The name of the vessel selected to be picketed was inserted upon the leaflet.

structed that all picketing must be peaceful and they must ignore any acts of provocation. Picket signs with the correct language will be furnished to your Port.

3. Your Port will be furnished with leaflets. All pickets are to carry a sufficient amount of leaflets which they will distribute as they picket. Pickets must be clearly instructed that under no circumstances should they speak to anyone, and in answer to all questions, they are merely to hand the person a leaflet.

4. If anyone asks you, as Port Agent, or asks the pickets whether they should cross the picket line, no answer should be given, but instead the person should be handed a leaflet.

5. In response to any inquiries, from other Unions, to you or your representative at your Port, refer them solely to the language on the picket sign and give him a copy of the leaflet. Do No More. If any of the pickets are served with a legal paper, they are to call their Union Office immediately. They are not to speak to anybody else. In the event legal papers are served, you must notify your headquarters immediately.

6. Any and all inquiries directed to you from the Press or anybody else, should be referred to your Headquarters. Do not engage in any conversation with such persons.

7. No one has authority to change these instructions except upon specific written authority from your Headquarters." (Resp. Exh. 8, attachment 3, A. 72, 73, 75)

The foregoing material was forwarded to United States ports where selected vessels were to be picketed, including the Port of Houston where initially, three foreign flag vessels were selected to be picketed and which included the vessels at bar, the SS Theomana and Northwind. The

site and scope of vessels to be picketed were limited and select.[5]

The picketing of the vessels SS Northwind and Theomana

The vessels Northwind and Theomana are registered in Liberia (A. 16) and the latter's managing agent charterer, is Windward Shipping (London) Limited, a British corporation (A. 16, 17). The vessel's crews were all aliens as well as non-Liberians, and covered by collective bargaining agreements as follows. As to the Theomana, agreements between the owners and/or operators with the Greek Panhellenic Seamen's Federation for two separate classifications of the crew and an agreement with the Indonesian Seafarers Union for the third classification (A. 18, 25). As to the Northwind, again two separate agreements with the Greek Panhellenic Seamen's Federation for two separate classifications and the Sierra Leone's Seamen's Union for the third classification (A. 19, 25).

On October 27 and 28, 1971, the respondents at Houston commenced picketing respectively, the vessels Theomana

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[5] Similar respondents' picketing activity as at bar at Houston, was also the subject of litigation in the United States District Court in Houston wherein an injunction request was denied; the denial affirmed by the Fifth Circuit and petition for certiorari denied by this Court. *Port of Houston Authority of Harris County, Texas* v. *International Organization of Masters, Mates, etc.*, 456 F. 2d 50 (1972), cert. den. — U.S. — 93 S.Ct. 113. The Circuit's recitation of respondents' conduct in the case before it, demonstrates identical conduct engaged in at bar, to wit:

> "The unions were jointly engaged in peacefully picketing selected foreign vessels in the Houston Port. At the time of the hearing, picket lines consisting of four pickets were being maintained at three of the forty-nine docks in the port.
>
> The pickets carried placards and also handed out literature. The effort was to call the attention of the public to the declining job opportunities for the American seamen caused by the use of foreign vessels, and to the substandard wages and working conditions on such vessels. The public was asked not to patronize the foreign vessels." (Ibid. 52)

and Northwind (A. 126). It was conceded and so stipulated, that there were four respondents' pickets carrying the picket signs, non obstructive and distributing the leaflets aforesaid (A. 126); the picketing at all times was peaceful and without violence or threat of violence (A. 126); there was no dispute between the vessel and its crew and respondent unions neither had nor claimed to have the right to represent the crews, nor did they seek to obtain such right nor was their picketing on behalf of any claim of the crew (A. 126); longshoremen and others refused to work upon or patronize the picketed vessels (A. 127); and the pickets spoke to no one and upon inquiry made of them, merely handed out the aforesaid leaflets (A. 127). The vessels at the time of the picketing were partially loaded and when it was alleged that such state rendered the vessels unseaworthy, respondent unions forebore their activities and took such cooperative steps on their part, so as to render the vessels seaworthy (A. 43, 44).

The litigation proceedings to date

Petitioner's first step to restrain respondents' peaceful picketing was the filing on behalf of the Theomana, of a charge with the National Labor Relations Board on October 29, 1971, alleging that respondents' conduct was in violation of Section 8(b)(4)(B) of the National Labor Relations Act and that such conduct constituted unfair labor practices affecting commerce within the meaning of the Act (A. 13). The following day, petitioners filed suit in the Texas District Court of Harris County seeking temporary and permanent injunction alleging respondents were guilty of secondary picketing (A. 128). In the interim, the aforesaid unfair labor practice charge was being investigated by the National Labor Relations Board (A. 19). Approximately ten days thereafter the NLRB charge was voluntarily withdrawn. Simultaneously, petitioners amended their state court pleadings to allege that the purpose of

respondents' picketing was to induce breach of contracts between the vessels owners or charterers and their crews and the foreign unions representing such crews (A. 128). Further alleged, was that such activity was in violation of Tex. Rev. Civ. Stat. Ann. Art. 5154 d. sec. 4 (1947), and a tort under Texas law.

Answering petitioners suit, as defenses thereto, the respondents *inter alia* asserted that the subject matter of the dispute was preempted to the NLRB by the Labor Management Relations Act, 29 USC 141, et seq. and that the activities sought to be enjoined were protected by constitutional guarantees of free speech. After trial upon the merits for a permanent injunction (A. 45), the trial court sustained respondents asserted defense of preemption and consequently found unnecessary, the consideration of the other asserted defenses (A. 125). Upon petitioners' appeal to the Court of Civil Appeals for The Fourteenth Supreme Judicial District of Texas, said court by opinion and order made May 17, 1972, affirmed the opinion, order and judgment of the trial court on preemption grounds, and as the trial court, found unnecessary the consideration and resolution of respondents other defenses (A. 125-138).

The Texas Court of Civil Appeals in accord with the trial court, found that respondents' activities were peaceful picketing to protest substandard wages and benefits of the foreign seamen contrasted to American seamen, with the consequential adverse affect of such foreign wages and benefits upon American seamen and their job opportunities here in the United States, with a concurrent request to the public not to patronize the foreign ships (A. 131-133, 137, 138). The appellate court concluded, such respondents conduct which " • • • but voices a complaint as to foreign wages and urges the public not to patronize foreign vessels • • • is peaceful picketing publicizing a labor dispute • • • ", and upon decisional law, its validity is suggested. However, the court went on to hold, "[I]t is at least arguably a protected activity under Section 7 of the

LMRA", finally concluding, preempted by the NLRB and therefore the trial court properly dismissed petitioners' action (A. 138).

Thereafter petitioners moved for rehearing and upon denial thereof, applied to the Supreme Court of Texas for writ of error. Said writ was refused, the Texas Supreme Court finding, "no error requiring reversal" (A. 139).[6] Petitioners filed their petition for a writ of certiorari with this Court on January 31, 1973. This Court by order made March 26, 1973, invited the Solicitor General of the United States to file a brief expressing the views of the United States and the Solicitor General thereafter filed such brief. On June 4, 1973, the petition for a writ of certiorari was granted.

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[6] Uninterruptedly, petitioners from court to court have proffered, premised upon partial testimony, that a finding be made that the respondents' picketing purpose was to compel the petitioners to increase their foreign seamen wages and assumedly, to then argue, it is over the employer-employee relationship aboard the foreign vessels which the NLRB lacks jurisdiction to determine, ergo, no preemption. (See, petitioners' post trial brief before the trial court, pages 6-8, 11, 16, 17; petitioners' brief before Court of Civil Appeals, pages 11, 12, 20; petitioners' supplemental brief for rehearing Court of Civil Appeals, page 8; petitioners' application to Supreme Court of Texas for writ of error, pages 6, 7, 17.) Rebuffed in each of these four attempts, petitioners nevertheless, now request this ultimate Court to make such findings, indeed a most unusual procedure (Petitioners' Brief, p. 7). Petitioners' manifest error is demonstrated by examination of all the testimony including the cited witnesses' testimony that his expressions are his own personal feeling and opinion, not the respondents and certainly not the purpose of respondents picketing (A. 101-103). Similar thereto is the illustration of reply to a hypothetical question as to "accomplishing educational goals", by payment of equal wages and benefits both foreign and American, and whether such would result in cessation of the picketing activities. Obviously, if that occurred, the picketing would have to cease, it would then be untruthful and unlawful (A. 81-82), *Linn* v. *Plant Guard Workers, etc.*, 382 U.S. 912 (1966).

Summary of Argument

American seamen who, as found by the Courts below, peacefully, truthfully and non obstructively picket select foreign vessels on public docks protesting and publicizing substandard wages and benefits of the crews of such foreign vessels and the adverse effect thereof upon American seamen employment opportunities here in the United States and concurrently request American workers and the public at such sites not to patronize and work upon such vessels, are engaged in the exercise of the Act's Section 7 rights to preserve their employment opportunities here in the United States. Such conduct is actually protected by the Act and immune from state court interference, *Garner* v. *Teamsters, Chauffeurs and Helpers Local Union No. 776,* 346 U.S. 485 [1953]; *International Longshoremen's Local 1416* v. *Ariadne Shipping Company,* 397 U.S. 195 [1970], concurring opinion Mr. Justice White at 202. At least such conduct is arguably protected by the Act, *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 [1959], and similarly immune from state court interference.

As further found by the Courts below, respondents activities were not to organize or represent the foreign crews aboard the select vessels whether by picketing, the invocation of NLRB election processes or in support of any foreign crews strikes or disputes with their foreign vessel employer, conduct such as was present in *Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138 (1957); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963); *Incres Steamship Co.* v. *International Maritime Workers Union,* 372 U.S. 24 (1963). The American seamen activities here, as markedly distinguished from the conduct and findings present in the foregoing trilogy, do not embrace the internal discipline and order of a foreign vessel. Nor do their activities, again as distinguished from the foregoing trilogy, require the Act's construction which

would necessitate NLRB inquiry into and regulation of, said internal discipline and order of the foreign vessel, the situation present in the foregoing trilogy. It is only "certain maritime operations" of a foreign flag vessel with a foreign crew, the activities and conduct present in the aforesaid trilogy, which are not in "commerce" within the Act's meaning and which makes inapplicable said statute's provisions to the regulation and administration of such foreign vessels employer-employee relations, *Ariadne supra.*

However, American seamen who are exercising Section 7 rights here in the United States to lawfully protest and publicize their loss of domestic employment opportunities here and seek to preserve such opportunities in the United States and which conduct clearly belies any attempt or purpose to organize or represent foreign crews aboard foreign vessels, whether by picketing or invocation of NLRB election procedures, or in support of foreign crews disputes with their foreign employer, are engaged in "commerce". Such activity is protected and immune from state interference, *Ariadne supra.* Although the vessel is foreign, the dispute is domestic. *Marine Cooks & Stewards Union* v. *Panama Steamship Co.*, 362 U.S. 365 [1960].

Congress by the Act's provisions *inter alia*, provided American workingmen with a bill of rights, *Benz supra.* Nor may such specific delineated Congressional enacted rights and their exercise in the United States, integral parts of the Congressional scheme, be fragmented, negated and exceptions carved out, premised upon Congressional enactments unrelated to labor legislation and whose concern is directed to wholly different national policies.

Vessels which enter our territorial waters subject themselves to our laws and their application in our jurisdiction, including the exercise of the foregoing Section 7 rights by American seamen directly related to a domestic issue,

to wit, the preservation of employment opportunities in their homeland. The intermittent calls of foreign vessels at United States ports do not authorize the extraterritorial application of foreign laws of such vessels' nations, to preclude or frustrate the implementation of our laws in our territories. It is always the laws of the United States that governs within our jurisdiction. *Uravic* v. *F. Jarka Co.*, 282 U.S. 234 [1931].

The Act's proscriptions and protections, its rights and remedies, manifiest our national policy. The Act's scheme encompasses all conduct within our jurisdiction without regard to the nationalities of the parties and notwithstanding the disputes origin. American seamen activities exercised in the United States seeking to preserve their employment opportunities here, do not constitute conduct warranting, requesting or necessitating extension of the Act beyond our territory. On the contrary, such activities are domestic implementation of the Act's protected rights, *Ariadne supra.*

Respondents activities are actually protected, *Garner supra,* and at least, arguably protected, *Garmon supra.* Such activities constitute protected conduct and necessitates no further inquiry as to whether they are arguably protected. Notwithstanding, petitioners suggest and indicate, assuming arguendo the Act's application to the issue at hand, respondents conduct is at best arguably protected and the *Garmon* doctrine, concluding that arguably protected rights are immune from state court interference, should be reassessed.

The underlying policy considerations for the Garmon rule continue viable to date and we express accord with the merits of the rule. Paramount however are fundamental con siderations which impel the conclusion, that change of the rule if any should be legislative and not judicial.

The impact of the *Garmon* rule had been directed to Congresses attention and discussed in debate in 1959 during

consideration and enactment of major changes in our national labor policy. Notwithstanding, Congress saw fit not to abrogate the rule. Instead Congress opted for a selective approach and where it saw fit to limit the rule's application to specific issues, it so acted rather than abrogate the rule in its entirety. Such rule represents the legislative determination and one which should not be disturbed, modified or abrogated by the judiciary, in due deference to our tri parte concept of government.

ARGUMENT

I.

The National Labor Relations Act preempts state jurisdiction to enjoin peaceful, non obstructive, primary picketing of a foreign flag vessel in the United States by American seamen truthfully protesting the substandard wages and benefits paid and provided as contrasted to American seamen, and the adverse affect such substandard conditions have on American seamen and their employment opportunities here in the United States, concurrently requesting the public not to patronize such vessel,

1. Peaceful, truthful and non obstructive primary picketing by American workmen, protesting substandard wages and benefits paid, are activities actually protected by the Act.

It is unquestioned that peaceful and truthful primary picketing, non obstructive and without trespass upon private property, by American workers protesting substandard wages and benefits paid, such as at bar, constitutes the exercise of the Act's Section 7 rights and actually protected by the Act. Such activity and conduct is immune from state judicial control preempted by federal law, to wit, the Act. *Garner* v. *Teamsters Chauffers & Helpers Local Union No. 776*, 346 U.S. 485, 499-500, (1953); *United Steelworkers of America* v. *NLRB*, 376 U.S. 492, 499 (1964); *In-*

ternational Longshoremen's Local 1416 v. *Ariadne Shipping Company,* 397 U.S. 195 (1970), concurring opinion Mr. Justice White at 202. Such preemption applies whether or not there is proximate employer-employee relationship, *Hotel Employees Union* v. *Sax Enterprises,* 358 U.S. 270 (1959); *Retail Clerks Local 560* v. *F. J. Newberry Co.,* 352 U.S. 987 (1957) and *Pocatello Building & Construction Trades Council* v. *C. H. Elle Const. Co.,* 352 U.S. 884 (1956).

The Texas courts below found respondent's activities to be lawful primary picketing,[7] and citing *Garner,* supra and supporting authorities, held, "Peaceful picketing has repeatedly been held protected by this Section (7) of the NLRA." (A. 131, 132). Further, relevant to discussion of the impact if any, of the factor that the primary site picketed were two foreign vessels, the Texas Courts concluded that, "its validity" (actually protected) "is suggested" (A. 138) and "* * * at least arguably, a protected activity under Section 7 of the NLRA". (A. 138). We hereafter discuss the aforesaid "arguably protected" concept. Suffice it to state at this juncture, the American seamen's activities at bar constitutes typical lawful primary picketing, sanctioned and protected by the Act, *Garner* and *Ariadne,* 397 U.S. at 202 *supra.*

The petitioners challenge at hand, is not to the character of respondents conduct as constituting activity actually within Section 7's protection, rather it is to the Section's applicability because the vessels are foreign with foreign crews. We respectfully submit that such challenge is unfounded.

2. The decisions in Benz, McCulloch, Incres, and Ariadne.

In support of their contention, petitioners cite this Court's decisions in *Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138 (1957); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963); *Incres Steam-*

[7] In accord, see findings in fn. (5), supra.

ship Co. v. *International Maritime Workers Union*, 372 U.S. 24 (1963) and *Ariadne, supra.* Such reliance by petitioners is in error.

Our starting point is *Benz.* There the foreign crew aboard the foreign flag vessel went on strike and picketed their vessel in a United States port, 353 U.S. at 140. The foreign crew then designated an American union as their collective bargaining representative and picketing continued by the crew, the designated American union and other American unions in support of the economic demands of the foreign crew notwithstanding existing foreign shipping articles made in a foreign country at the voyage's commencement. The issue before the Court was the applicability of the Act to the aforesaid controversy. After reaffirming Congresses' power to make the Act applicable to such controversy when such vessel "was within our territorial waters" (*ibid.* 142), the Court concluded that Congress however, did not so choose, holding: "Our study of the Act leaves us convinced that Congress did not fashion it to *resolve labor disputes between nationals of other countries operating ships under foreign laws*" (*ibid.* 142, emphasis supplied).

Significant to the issue at bar, in referring to appropriate and applicable legislative Report, the Court emphasized that the Act was "• • • both for American workingmen and their employers", and that object prescribes the boundaries of the Act as "the workingmen of our own country and its possessions" (*ibid.* 144).[8] The Court concluded, that to include within the Act's coverage disputes between foreign ships and their foreign crews, to be resolved and regulated by the Act's provisions, the issue there, would represent a 'sweeping provision' as to foreign applicability.

In *McCulloch*, an American union petitioned the NLRB, invoking the Act for a representation election to be con-

[8] Reiterated in *McCulloch* supra 372 U.S. at 18, 20.

ducted by the Board among the foreign crew members of a Honduras flag vessel who were already represented by a Honduras union and certified under Honduras law. Similarly, in *Incres,* decided the same day with *McCulloch,* picketing was directed to a foreign vessel with a foreign crew by an American union formed for the primary purpose of organizing and representing foreign seamen aboard foreign vessels. The issue presented was whether the Act extends to the foreign crews aboard the foreign vessel *McCulloch* at 12. This Court, in accord with *Benz,* held the Act to be inapplicable to a foreign vessel's "internal discipline and order", *McCulloch* at 19, regulation through the Act's provisions to activities "directly related (to the foreign vessels) employer-employee relationship", *Incres* at 28, further pointed out that such Board regulation surfaced the "possibility of international discord" and retaliation, *McCulloch* at 19, and concluded that the Act was not applicable to such internal discipline and order of the maritime operations of the foreign crew, *McCulloch,* 372 U.S. at 20, *Incres,* 372 U.S. at 27.

The patent thrust of the foregoing authorities, as demonstrated by this Court's subsequent *Ariadne* decision, discussed *infra,* is that "certain maritime operations" of a foreign flag vessel with a foreign crew, to wit, its internal order and discipline, its employer-employee relations of the vessel and its crew, are not in "commerce" within the meaning of the Act's Section 2(6) and consequently the Act's provisions are inapplicable to the regulation and administration of such employer-employee relations. However, lawful protected conduct here in the United States such as at bar, which clearly belies any attempt or purpose to organize or represent the foreign crews aboard foreign vessels whether by picketing (*Incres*), or invocation of NLRB election procedures to the vessel and its crew (*McCulloch*), or in support of foreign crews strikes over their employer-employee issues (*Benz*), but which on the contrary, openly manifest the exercise by

American workers here in the United States of independent and specifically provided enacted federal rights, are in "commerce" within the meaning of the Act's Section 2(6), *Ariadne, supra.* None of respondents aforesaid conduct, seek or require the imposition of the Act's provisions to the regulation or administration of the internal order and discipline of petitioners vessels.

In *Ariadne,* this Court held that longshoremen picketing a foreign vessel with a foreign crew protesting that longshore work being performed by "employees of the ship and some of it by outside labor" 397 U.S. at 197, was "being done under substandard wage conditions" (*ibid.* 197), constitutes lawful activity subject to and covered by the Act and that the *Benz, McCulloch* and *Incres* holdings are inapposite.

The *Ariadne* court in discussing the *Benz, McCulloch* and *Incres* holdings, noted, 397 U.S. at 198, 199:

> "This construction of the statute * * * was addressed to situations in which Board regulation of the labor regulations in question would necessitate inquiry into the 'internal discipline and order' of a foreign vessel, an intervention thought likely to 'raise considerable disturbance not only in the field of maritime law but in our international relations as well."

No such construction for Board inquiry or regulation of the foreign crews labor relations is present or conceivable let alone necessitated, in the matter at bar. In fact, none is sought or even suggested.

Referring again to the foregoing trilogy, identifying the disputes and issue there present for determination, the *Ariadne* Court identified such disputes, as "disputes between foreign ships and their foreign crews" 397 U.S. at 198, 199, and as to which the Court found were not expressly covered by the Act. Such are the disputes which involve

"internal affairs" and "internal order and discipline of the foreign flag vessel".

We reiterate at bar there is not present, as dissimilar from the aforesaid trilogy, any dispute between the foreign ships and their foreign crews. On the contrary, the dispute here is solely domestic. It is by American seamen here in the United States protesting their loss of employment opportunities here in the United States, seeking to preserve those remaining, and neither supporting by picketing or otherwise any dispute between the foreign vessel and its foreign crew.

The critical difference between the trilogy cases and the case at bar is that in the trilogy there were attempts to export American law and make it applicable to foreign vessels, foreign jurisdiction, the internal economy of the foreign vessels. At bar, it is the petitioners who seek to export their foreign law into our nation and prevent application of American law in our country. This distinction is most critical, for as we show in our Point 4 supra, such application of foreign law is improper.

3. NLRB jurisdiction is applicable to the case at hand, notwithstanding the vessels are foreign flags.

As found by the courts below, "the basic facts * * * were established by stipulation or uncontraverted evidence", (A. 126). Foreign flag vessels now carry 95% of American seaborne commerce. This condition has been brought about substantially by foreign vessels substandard wages and conditions contrasted to those of American seamen. And, as conclusively demonstrated and found, such has had dire effect upon American seaman and their employment opportunities here in the United States. To preserve their remaining job opportunities here in the United States, respondents members engaged in protest picketing of select vessels at select sites, publicizing the foregoing facts and requesting the American public not to

patronize such foreign vessels.[9] As additionally found, there is no dispute between the petitioners and their employee alien crewmen. The respondents neither have nor claim the right to represent the foreign crews, nor seek such right, nor do they seek to support the foreign crewmen in any disagreement they have or may have with petitioners. Additionally, none of the alien crews are members of respondents' unions and the latters protest picketing has been peaceful, limited in numbers to four pickets, select and without violence or threat thereof. The pickets carrying the aforesaid picket signs spoke to no one and handed out literature containing details of their protest. Longshoremen and others, American employees of American employers, refused to cross the picket lines and work on petitioners' two vessels.

The foregoing activities and conduct, as indicated by this Court in *Marine Cooks & Stewards Union* v. *Panama Steamship Co.*, 362 U.S. 365 (1960), does not constitute interference with the internal order and discipline of a foreign crew aboard a foreign vessel, its internal affairs or economy, a concern which resulted in this Court's decisions in the trilogy aforesaid. In *Marine Cooks*, the conduct was most similar to that at bar; peaceful protest picketing of a foreign vessels crews substandard wages and conditions contrasted to those of American seamen and publicizing the dire adverse consequences to American seamen employment opportunities here in the United States. The Court there stated, 362 U.S. at 371 fn. 12;

> "Unlike the situation in the Benz case, in which American unions to which the foreign seamen did not belong picketed the foreign ship in sympathy with the strike of the foreign seamen aboard, the union members here *were not interested in the internal economy*

[9] As shown, supra, respondents also distributed literature publicizing the dispute, in other communities, cities and areas and arranged for other media communications of the issues.

> of the ship, but rather were interested in preserving job opportunities for themselves in this country. They were picketing on their own behalf, not on behalf of the foreign employees as in Benz. Though the employer here was foreign, the dispute was domestic. * * * "[10] (emphasis supplied)

Of extreme significance and as found by this Court, Congress clearly and expressly formulated the Act, "both for American workingmen and their employers * * * including * * * the workingmen of our country and its possessions", *Benz*, 353 U.S. at 144, *McCulloch*, 372 U.S. at 20. And Congress did not exclude American seamen from its proclamation and grant of rights to American workingmen in our country, from exercising those rights in their homeland for their benefit, as distinguished for the benefit of aliens.

Respondents members, as American workingmen are protesting their loss of job opportunities here in the United States and seek to preserve such opportunities here. They are lawfully exercising one of the aforesaid federal rights granted by the Act's Section 7, *Garner, supra*. Respondents' dispute is here. Their members, American merchant seamen, substantial loss of employment opportunities is in the United States. They do not support or seek representation of or for the foreign crews, as in *Benz* and *Incres*, let alone utilization of the Act's provisions therefore as in *McCulloch*. Their activities, in sharp contrast to *Benz*, *Incres* and *McCulloch* are *not directly related* to the foreign flag vessels employer-employee relations, *Marine Cooks*

[10] Although the Court was there resolving the definition of a labor dispute under the Norris-LaGuardia Act and thereafter in McCulloch, referred to its conclusion that the application of that Act differs from the application of the Taft-Hartley Act (372 U.S. at 18), nevertheless the fact that the NLRA rather than the Norris-LaGuardia Act is involved at bar, does not convert a domestic dispute into one which affects the internal affairs or economy of a foreign vessel with a foreign crew.

supra. To the contrary, respondents protest picketing activities is the antithesis of seeking representation rights for the foreign seamen or support thereof. Respondents are requesting that the foreign vessels and their crews be economically ostracized—don't patronize—help American seamen maintain and preserve their job opportunities here in the United States.

The dispute here is centered solely on loss of job opportunities of American workers here in the United States.[11] Nor does it reach the level of the possible conflict contained in the dispute encompassed in *Ariadne* where the Court found the dispute there, centered on wages to be paid by the foreign flag vessel to American longshoremen residents, and held the same to be a domestic dispute and not interference with the internal affairs of the foreign vessel, *Ariadne*, 397 U.S. at 199, notwithstanding the work was performed in part by the foreign crew and their wages paid, substandard to that of the longshoremen.

It is paramount to note, as distinguished from the facts in *Ariadne*, where the involved longshore work in dispute

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[11] Respondents activity is directly related to and an integral part of American seaborne commerce. Commerce under the Act's Section 2(6) infra, includes *inter alia* "trade and transportation" between the United States and any foreign country. It is such "commerce" the loss of job opportunities therein, the substantial reason therefore, and the preservation of those remaining, which respondents are protesting, publicizing and seeking mutual aid and assistance, as provided for in Section 7. The Act's Section 2(6) provides:

> "The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia, or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

was performed in part by the foreign crew,[12] but notwithstanding the same, this Court found the Act applicable, at bar none of the respondent unions members are employed by the foreign vessel or seek such employment. They have no such nexus with the vessel. Their presence is only at the vessel site publicizing their truthful protest when the vessel makes it irregular and comparative short call at a United States port to discharge and/or load its cargo. As the court below pointed out:

> "The protest (respondents) is not directed to allegedly substandard wages paid by foreign shipowners to then-employed American seamen, but to allegedly substandard wages paid to foreign seamen, with a concurrent request to the public not to partonize the foreign ships. There is no direct interference with the relationship between employer and crewmen. Any direct interference is between the consignee and the shipowner, or the shipowner and stevedore company. The fact that appellees are seamen and not merely longshoremen cannot indicate greater involvement in the internal affairs of the ships because none are employed on those ships," (A. 137).

Nor do the consequnces of respondents' lawful primary protest picketing, calling to the American public's attention the facts of the American seamen's loss of job opportunities here in the United States, and the substantial cause thereof, concurrently requesting their help not to patronize the picketed foreign flag vessels, convert such successful activity into conduct of direct interference with the foreign flag vessels employer-employee internal affairs, *NLRB* v. *Fruit and Vegetable Packers Local 670,* 337 U.S. 58, 72, (1964), cf. *Local 761 International Union of Electrical Workers* v. *NLRB,* 366 U.S. 667, 673, (1961). Nor does the fact that

[12] With respect to such fact, this Court in *Ariadne,* 397 U.S. at 199 fn. (4) supra, put to one side, the effect if any, if such work is carried out entirely by a ship's foreign crew, pursuant to foreign ship's articles. Such possible fact however, is not present at bar.

lawful protest picketing activities occurred at the site of the vessel, constitute direct interference with the foreign flag vessels employer-employee internal affairs, *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308, (1968).

4. The laws of United States govern within our jurisdiction. No extraterritorial application of foreign law is permissible to impinge upon or frustrate rights provided by American law to residents in our country.

As this Court stated in *Benz*, 353 U.S. at 142:

> "It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country. Wildenhus Case 1887, 120 U.S. 1, 75 S. Ct. 385, 30 L. Ed. 565."

Further in *Benz*, this Court in its study of Congress' manifest intent pointed out *supra*, that Congress expressly created federal rights, a "bill of rights" for American workingmen here in the United States, 353 U.S. at 144. Such expressed rights constitute American law. Vessels which enter our territory are subject to the provisions of such laws and their exercise here in the United States, *Benz*, 353 U.S. at 142.

As we have demonstrated (paragraph 3, *supra*), one of such American workingmen's bill of rights, is the right to lawfully and peacefully picket in the United States to protest substandard wages and conditions which threaten their job opportunities here in the United States and to preserve such job opportunities for themselves in this country, *Garner, supra*. It is this law, the law of the United States that, "always * * * governs within the jurisdiction of the United States * * * " and that includes our territorial waters, *Uravic* v. *F. Jarka Co.*, 282 U.S. 234, 240 (1931).

Petitioners object to respondents' activities, as interference with the relationship of the foreign vessel and its

foreign crew reflected in the articles made pursuant to Liberian law and controlled thereby (Resp. Brief, p. 15). They, in thrust, effect and purpose constitute such articles and Liberian law to be binding upon American citizens here in the United States and thus to preclude, as respondents here are doing, the exercise of federal provided rights to preserve their domestic employment opportunities. Such petitioners object is sought, notwithstanding as found, that respondents do not or seek to represent, organize or support the alien seamen parties to such articles, but are solely seeking preservation in their homeland of their domestic employment opportunities. Stripped of petitioners' semantics, they seek the extraterritorial application of foreign laws to our nation, to both substitute for and negate the laws of our nation and the rights which Congress has expressly provided for American workingmen.

Petitioners position is that found in *Uravic, supra,* an attempt by a foreign flag vessel in our territorial waters to make applicable here in the United States the foreign law of the vessel's country, contrary to provisions and concepts of our laws. In response, we reiterate Mr. Justice Holmes in *Uravic, supra,* "It is always the laws of the United States that governs within the jurisdiction of the United States." So at bar. It is our nation's law—one of American workingmen's bill of rights which the American seamen are exercising here in the United States, and it is such law which governs, not Liberian law.

Contrary to petitioners and their amici suggestions, treaty provisions for access to and egress from ports of contracting parties are subject to the exercise of a nation's jurisdiction and its laws in its territory. As at bar, such access and egress to petitioners' vessels to our ports is and has been assured and not abridged, witness the vessels presence and subsequent departure. However, such freedom is patently subject and limited to the provisions and

application of our nation's laws as we see fit to exercise,[13] *Benz, supra, Cunard SS Co.* v. *Mellon*, 262 U.S. 100 (1923). And our nation has made such an exercise for our workingmen in our nation by the passage of the Act.

Our nation in promulgating labor laws and concepts contained therein, has enunciated a panoply of rights, including a bill of rights *supra*, for American workingmen. Although foreign nations and others may disagree as to the advisability of certain of such rights as well as other provisions and policies of our labor laws, as apparently petitioners do at bar, nevertheless we as a nation have made the determination and such is absolute.

A cardinal right, as we have demonstrated *supra*, is the right of American workingmen to non obstructively and peacefully by primary picketing, protest activity and conduct which depresses their employment opportunities in this country and to seek the mutual aid and assistance of their fellow workers (Section 7), to preserve such employment opportunities. This is what this case is all about and nothing more. To those who disagree with our nation's labor policy formulated by Congress, whether foreign ship owners or others, their arguments should be directed to Congress not our Courts, *McCulloch*, 372 U.S. at 22.

Nor does our national labor policy solely encompass strife between our employers and employees. Although "the Act primarily"[14] concerns such strife, *Ariadne*, 397

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[13] A most recent demonstration of our nation's exercise of our jurisdiction as to all foreign vessels access to our ports, is the enactment of the Ports and Waterways Safety Act of 1972, P.L. 92-340, 1972, 86 Stat. 424 and its Title II providing for regulation of foreign vessels entering our ports and if need be exclusion thereof, in order to protect and preserve our marine waterways and environment.

[14] Petitioners erroneously view our national labor policy as one limited to strife between employers and employees and, therefore inappositely suggest the application of inappropriate provisions of our Labor Act, a determination which Congress forebore, (Pet. Brief, ¶C, pp. 22-25).

U.S. at 198-199, it by no means is so exclusively limited. The rights provided American workingmen in the United States do not depend upon or limited solely to the relationship of employer-employee, *Sax Enterprises supra.* To the contrary, the Congressional scheme as utilized is broad, whether *inter alia,* enunciated as workingmen's rights in Section 7, or union, employee or employer unfair labor practices (rights and obligations), in Section 8 with its multiple subdivisions. Nor are many of the Act's rights and proscriptions limited to the nationality or country of origin of the employer. The criteria is whether the conduct occurring is within our territorial jurisdiction, a domestic dispute, such as at bar.

The NLRB has exercised its jurisdiction and implemented the Act's provisions where the unlawful conduct has occurred within our nation, notwithstanding the fact that the dispute was foreign and that the primary employer and its employees were foreign. *Washington-Oregon Shingle Weavers Council (Sound Shingle Co.),* 101 NLRB 1159 [1952]; *International Wood Workers of America (T. Smith & Sons, Inc.),* 125 NLRB 209 [1959].[15] Provisions of the Act and specifically Section 8(b)(4) thereof may be implemented by "any person" without regard to his na-

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[15] Amicus Mobile Steamship Association, in support of petitioners, cites a recent Alabama Supreme Court decision, *American Radio Association* v. *Mobile Steamship Association,* 279 So. 2d 467, 83 LRRM 2567, a state court case commenced by said Association, American employers, to restrain picketing of two foreign flag vessels. The trial court granted a preliminary injunction without findings. Upon appeal therefrom to the Alabama Supreme Court, the appellants *inter alia,* raised such failure of findings. In response, the Court held: "But apparently the trial judge found from the evidence that there was wrongful interference by the appellants with the appellees' business, *for otherwise he would not have ordered the temporary injunction to issue",* (emphasis supplied). It appears to us such conclusion is substantial error particularly where, as there, serious challenge upon appeal was made to the absence of findings,

tionality, under the Act's Section 10(b). And, of course, "whosoever shall be injured", again without regard to nationality, may sue pursuant to the Act's Section 303 for damages as a consequence of an unfair labor practice provided for in the Act's Section 8(b)(4). The sole implementing criteria is the conduct occurring within our jurisdiction. In fact, as the record at bar demonstrates, one of the petitioners invoked the Act's provisions, filed unfair labor practice charges with the NLRB alleging a Section 8(b)(4) violation and ten days thereafter, voluntarily withdrew the same.

The foregoing we submit, demonstrates conclusively that the Act's provisions are not inapplicable merely because the dispute involves a foreign national. On the contrary, if the dispute is domestic such as at bar, where American workers are seeking to preserve employment opportunities here, the right provided by the Act to attain such objective, is patently applicable. Such is wholly different from the activity present in the trilogy aforesaid, where the Act's provisions were sought to be applied to the regulation of the internal affairs of a foreign vessel and subject it to American (NLRB) administrative regulation and determination. No such regulation or application of the Act's provisions are sought, required or opted for at bar. What respondents do seek, is to prevent

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the substantive testimony, its full purport, authority and weight. Present therein are issues of federal preemption and deprivation of freedom of speech in violation of the First and Fourteenth Amendments. Notwithstanding that plaintiffs there were not the two foreign flag vessels but American employers claiming interference with their American business by reason of the picketing of a foreign flag vessel and the decisions in, *Madden* v. *Grain Elevator Workers Local 418*, 334 F. 2d 1014, 1019 (7 Cir.), cert. den. 379 U.S. 967 and *Grain Elevator Workers Local 418* v. *NLRB*, 376 F. 2d 774, 776 (D. C. Cir.) cert. den. 389 U.S. 932, holding such complaint preempted by the Act, the Alabama Supreme Court nevertheless affirmed the assumption of jurisdiction. The time to file a petition for writ of certiorari to the United States Supreme Court has not run.

petitioners from vitiating and frustrating the implementation of their fundamental right which Congress granted to American workingmen here in our nation.[16]

5. Federal labor policy is manifest in labor statutes, not in statutes whose concern and purpose is directed to other national policies and objectives.

Petitioners argue for an exception to the exercise of Section 7 rights, so as to exclude from its coverage, American seamen workingmen notwithstanding Section's 7 pervasive and all encompassing language, (Pet. Brief, ¶ B pp. 19-22). The premise for the exception, is the passage of the Merchant Marine Act of 1970 P. L. 91-469, 84 Stat. 1018 (1970), 46 U.S.C. 1101 *et seq.* Such contention, totalling lacking in merit or authority, is at best fanciful.

The latter Act's specific policy declaration makes clear the Congressional and national purposes of said Act, to wit, "the fostering, development and maintenance of a merchant marine", (Section 1101). It does not purport, let alone actually regulate or seek to regulate, national labor policy or any part thereof, including the establishment,

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[16] We note in the joint brief of amici *West Gulf Maritime Association, Inc.* and other Associations representatives, domestic entities, filed in support of petitioners, that the constituencies thereof includes, "owners and/or operators of foreign flags", (p. 2, their Brief) and presumably petitioners herein, as witness on said page 2, their representation that, "virtually all owners * * * of vessels * * * calling * * * at Houston, etc." are members of said Association. The incidents at bar occurred at Houston, (see also fn. (5) supra). As such domestic association members, they are subject to and the beneficiaries of American laws including our labor laws. It is anomalous, if not ironic, that notwithstanding such beneficence to them of American law, they can merely change their "proverbial hats" when it suits them to become foreign flag operators, not subject to the obligations of the same laws and simultaneously seek to frustrate the utilization and exercise by American workingmen of federal rights, such as they are attempting at hand. As to their further unfounded lament as to alleged financial dire consequences, such should be directed to bodies other than this Court, *McCulloch*, 372 U. S. at 22.

administration and regulation of the rights of any American workingman. Such Marine Act's legislative history and its results do not even remotely manifest a consideration by Congress of labor policy, its administration and regulation. The hallmark of "labor legislation", represents an overwhelming volume of Congressional debate, exhaustive examination of views of diverse and antagonistic political and economic interests distilled into the final product, as witness the Taft-Hartley Act, its predecessor the Wagner Act, and the subsequent Landrum-Griffin Act. The foregoing Marine Act is devoid of any such labor policy treatment, let alone a modicum thereof. Petitioners endeavor to utilize the Marine Act to decimate the exercise of long established federally enacted rights by American seamen (Section 7), would lead to chaos and frustration of established labor policy. The impact of such contention as opted for by petitioners, would be disastrous and diametrically opposite to national labor policy and its administration.

Petitioners endeavor here is not novel. Analogous endeavor has recently been attempted by those allied with petitioners and rebuffed in *Port of Houston Authority supra*, 456 F. 2d at 53. There, exception was sought from the proscriptions of the Norris-LaGuardia Act on the alleged ground, "for protecting foreign commerce with friendly nations on the basis of underlying treaties". The Circuit there unanimously rejected the request and this Court denied certiorari, *supra*.

American workingmen have enjoyed Section 7 federal protected rights underlying the right to picket and protest as at bar, for more than a quarter of a century, *Garner supra*. Suggestions or arguments to deprive all or any American workingman of any of such rights should be directed to Congress, not the Courts, *McCulloch*, 372 U.S. at 22, *Port of Houston Authority*, 456 F. 2d. at 53. Nor

can these federal statutory rights be repealed by implication through the device of the Marine Act, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968); *W. L. Mead* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 25*, 217 F. 2d. 6, 9 (1 Cir.).

II.

The Texas State Courts Inter Alia, Properly Applied the Garmon "Arguably Protected" Rule.

The Texas Courts found *supra*, that respondents activities (Section 7), upon decisional law, indicated that it is actually protected under the Act and that at least is arguably protected, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), (A. 138). Paramount, is that this Court has found conduct such as at hand, to be actually protected by Section 7, *Garner supra, Ariadne supra*, Mr. Justice White concurring opinion. Nevertheless petitioners argue (Pet. Brief, ¶ III), *Garmon* is inapplicable because first, the Act is inapplicable to internal affairs disputes of foreign vessels and second, opinions of some individual Justices of this Court, "appear to disapprove the 'arguably' rule as such" (Pet. Brief, pp. 27, 28).[17] However, after expressing accord with such disapproval of the *Garmon* rule, they proclaim to limit their argument directed to their disapproval of the *Garmon* rule concept to the facts in issue at bar, (Pet. Brief, p. 28). We shall discuss petitioners both arguments.

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[17] In *Amalgamated Ass'n. of Street Car Employees etc.* v. *Lockridge*, 403 U.S. 274 (1971), one of the dissenting opinions referred to by petitioners, there the preemption issue as distinguished from the facts in the case at bar, arose in the context of an action commenced by a member against his union.

1. There is no internal affairs dispute and the Act is not limited solely to disputes between American employers and their American employees. Central to the Act are Section 7 rights. The exercise of such rights in the United States by American workmen to protest the loss and seek preservation of domestic employment opportunities, constitutes activities highly to and actually central to the Act's purposes, object and scheme.

Petitioners declare as fact and law, that the Act is concerned with American employers and their disputes with American employees but then state, assuming arguendo foreign ships and foreign seamen are subject to regulation by the Act, the *Garmon's* rule premises for NLRB preemption, the averting of state interference with national labor policy, would not exist here,[18] because their argument goes, "such regulation (is not) of industrial strife between American employers and American employees with which the Labor Act and national labor policy is concerned," consequently "not central" to the Act and thus should be subject to state regulation (Pet. Brief, pp. 28, 29).

Petitioners fail to recognize that the Act's scope is not exclusively the regulation of disputes between an American employer and its employees. The Act, as this Court has declared, "primarily concerns," such disputes, *Ariadne*, 397 U.S. at 198, 199. However, primacy is not exclusivity. As *Benz* and *McCulloch supra*, conclusively inform, the Act created a "bill of rights" for American workingmen. Central to such bill of rights is the actual protected right of American workingmen to lawfully engage in primary picketing and other publicizing to preserve their employment opportunities here in the United States (*Garner supra*) and lawfully seek to obtain the mutual aid and assistance of fellow workmen as at bar (Section 7). Such

[18] The *Garmon* rule precept is to avert all interference with national policy and exclusive competence of the NLRB whether such interference is by state or federal authorities.

right and its exercise is both actually *supra*, and arguably (*Garmon supra*) protected.

Petitioners in addition to their expressed disapproval of the *Garmon* rule, finally argue for a special non-preemption rule for foreign vessels within our jurisdiction, a result sought tantamount to special legislative action (Pet. Brief, p. 29). Such argument we respectfully submit requires but summary treatment and reply to wit; respondents activities constitute actual exercise of federal provided rights, *Garner supra* and foreign vessels within our territory are subject to our laws *Uravic supra*. Petitioners argument aforesaid should be directed to Congress.

2. The challenge to the Garmon rule is unfounded and inappropriate.

Petitioners argue that the policy consideration underlying the *Garmon* "arguably protected" rule, precluding interference by other authorities, with primacy to the NLRB, does not exist with respect to a foreign vessel, assuming arguendo, the Act's applicability and Board inquiry into and regulation of such vessel's labor relations. Their alleged reasons,—the Act and national labor policy is concerned with industrial strife between American employers and American employees. We have shown *supra*, that petitioners misconceive the facts and issue at bar,—the distinction on the one hand of the conduct in the trilogy aforesaid which petitioners constantly opine is that at bar, notwithstanding no such findings below but on the contrary its rejection, and on the other hand, respondents actual conduct as found by all the Courts below to wit, it is for preservation of employment opportunities in the United States, conduct less than that in *Ariadne*.[19]

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[19] In *Ariadne* some of the foreign flag vessels crews performed the longshoremens' work and which employment by the vessel was sought by the longshoremen. Respondents here want no employment of any kind by the vessel.

Central to the regulation of the rights under the Act, including respondents right and exercise as aforesaid, are the preemption and primacy policy considerations. Petitioners submit no substantive argument for their stated accord with individual Justices opinions which they enumerate,[20] and which to them, appear to disapprove the "arguably rule as such" (Pet. Brief, p. 28). Lest we not be foreclosed in the event this Court determines to pass upon petitioners observations and their accord with such observations, we set forth our fundamental argument in support of the *Garmon* rule, without reference to the merits of the rule, other than to state we are in accord with the underlying policy considerations for the rule.

The *Garmon* arguably protected rule has constituted the law, and an integral part of our national labor policy, its administration and enforcement for almost 15 years since this Court's decision in early 1959. Suffice it to state, Congress, the American workingmen, their unions, American employers and other persons doing business in our nation as well as others, and all Courts both state and federal, recognize the *Garmon* holding, its thrust and purport, notwithstanding upon occasion resort may be had to limited reinstruction to state authorities as to its dictates. For the judiciary to now change the rule, would do injury and harm to long established and solemn principles hereafter illustrated.

It is academic to state, that Congress constitutes the source for the establishment, modification and repeal of federal legislation and the rights and obligations embodied. Regarding labor legislation, our history demonstrates conclusively, that in such field some of the most intensive and fierce legislative debates occur, for they are the manifestations of sincere and deeply held views of powerful and widespread forces in our society, with multiple conceptions. Attempts to legislate in this field, are long and bitter and

[20] Pet. Brief, p. 28.

generally represent compromise of views, distillation after long and arduous compaigning, lobbying, propagandizing but most important, ultimate legislative determination. The arduousness of the task is made manifestly more difficult because the ultimate legislation enacted, uniquely as distinguished from most other legislation, affects an overwhelming number of our citizens and their families economic and social well being. It constitutes an intergral fabric of our peoples concerns.

In recognition of the foregoing, we most respectfully submit, that change if any in the "rules of the game" of labor relations, should reside solely with the legislature. Evermore so is that imperative, where the rule sought to be changed has in fact been called to Congresses attention and they have opted not for change, but for the pursuit of a different remedy. Legislative debate demonstrates such history applicable to the *"Garmon* arguably protected rule".

The most recent attempt by Congress to deal comprehensively with labor legislation resulted in the Act as amended in the fall of 1959. Its legislative genesis commenced prior, in 1958.[21] A vexatious issue which Congress faced, was whether legislation was appropriate to regulate what to then was the right of a labor union to picket an employer's establishment for its recognition as the collective bargaining representative of the employer's employees, without the requirement for an NLRB election. During the debate, this Court decided *Garmon*. Shortly thereafter concerning debate on the aforesaid issue, Sen. Mundt [22] in support of legislation to regulate such recognition picket-

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[21] References are to Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, consisting of two volumes prepared and published by the National Labor Relation-Board and referred to volume number and pages thereof. Leg. Hist. Vol. II p. 968, January 20, 1959, Cong. Record p. 816, Senate.

[22] Leg. Hist. Vol. II p. 1180, April 24, 1959, Cong. Record p. 5957, Senate.

ing, pointed out to the Senate that the *Garmon* rule (arguably protected), precluded state courts from exercising jurisdiction over conduct such as recognition picketing. Most significant and notwithstanding the clear reach of the *Garmon* rule and Sen. Mundt's exhortations as to its impact, Congress nevertheless over the next several months until the Bill's enactment in the fall of 1959, took no action to legislatively negate or modify the *Garmon* rule and its impact.[23] On the contrary, a selected approach was utilized. Where activities which pursuant to *Garmon* were arguably protected, but which Congress determined warranted regulation, it amended and regulated the activities (Section 8(b)(7)). However, as to other activities equally "arguably protected" but which Congress determined warranted no regulation or further regulation, it left the same undisturbed.

As contrasted to the foregoing treatment by Congress of the impact of Court decisions in the labor field, is that which Congress accorded to *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1 (1957). There, the Court found that states were without jurisdiction to intervene in labor disputes where the NLRB, possessed of jurisdiction, nevertheless refused as legislatively authorized to assert its jurisdiction, creating what has been referred to as a "no man's land". Congress there moved directly to the issue presented by the Court's decision and made the change which now constitutes the Act's Section 14(c). Significantly, no such treatment was accorded by Congress to *Garmon*. To the contrary as shown supra, a selective approach was employed.

We here reiterate our submission. Change or modification of labor legislation and the rules fashioned therefor

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[23] Further Congressional knowledge of the impact of the *Garmon* rule and the suggestions for appropriate modification of the arguably protected rule during the debate on amendments to the Act, are the extension of remarks and insertions in the Congressional Record Appendix, of authorities used by Cong. Whitener, Leg. Hist. Vol. II p. 1766-1768, Cong. Record A 6371-6387.

should emanate from Congress. Particularly so where as here, the subject involved is of long tenure with regulation and administration thereunder a fabric of our national labor policy and where Congress at the time of legislating upon labor legislation was aware of the rule, its attention directed to the rule, but nevertheless did not see fit to repeal the rule and instead exercised a selective approach and legislated such changes which it deemed appropriate.

CONCLUSION

The Judgment of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas Should Be Affirmed.[24]

Dated: September 26, 1973.

Respectfully submitted,

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[24] Respondents upon trial, defended against petitioners injunction petition raising *inter alia*, the defense that their peaceful and non obstructive picketing upon public docks or with the owners consent, publicizing the loss of their job opportunities here in the United States by reason of the foreign flag's vessels substandard wages and working conditions, constituted exercise of freedom of speech, protected by the First and Fourteenth Amendments. The Courts below found respondents conduct preempted and immune from state restraint and found unnecessary, the determination of such constitutional issue. By reason thereof and by virtue of the fact that respondents have no reason to believe that Texas Courts would not give observance to respondents constitutional rights, respondents have not briefed or argued such constitutional rights issues.

APPENDIX

§ 157. Right of Employees as to Organization, Collective Bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158. Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership

therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmerbership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of

this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry effecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object there is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such

employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for service which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer

where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing to induce any individual employed by any

other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor parctice under this subsection.

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in the contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 15-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not

established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a) (3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title. July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601; Sept. 14, 1959, Pub. L. 86-257, Title II, § 201(e), Title VII §§ 704(a)-(c), 705(a), 73 Stat. 525, 542, 545.